HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

OSA No.: 15 of 2000
Reserved on: 31.7.2007.
Decided on: 7.8.2007

M/s Vallabh Alloys (Private) Limited .....Appellant.

Versus

Himachal Pradesh Financial Corporation .....Respondent.

Coram:

The Hon'ble Mr.Justice Deepak Gupta, Judge.
The Hon'ble Mr.Justice V.K. Ahuja, Judge.

Whether approved for reporting? Yes.

For the appellants: Mr.B.K. Sood, Advocate, vice Mr.K.D. Sood, Advocate.

For the respondent: Mr.Bimal Gupta, Advocate.

Per V.K. Ahuja, J:

This is an appeal filed by the appellant against the judgment and decree passed by Justice R.L. Khurana, dated 23.5.2000, whereby he had partly allowed the claim of the appellant for recovery of Rs.1, 01, 315/- but had dismissed the claim of the appellant for recovery of a sum of Rs.4,60,000/-.

Briefly stated the facts of the case are that the appellant as plaintiff filed a suit for the recovery of Rs.5,85,491/- alongwith interest as against the

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[1] Whether reporters of Local papers may be allowed to see the judgment? Yes.

respondent who was impleaded as defendant. The allegations made by the plaintiff were that the plaintiff is a Company and defendant had advanced some loan to M/s Himachal Concast Pvt. Limited, Nalagarh, who had allegedly defaulted in the payment of the aforesaid loan. On account of the defaults made by the said Company, the defendant took over the assets of the aforesaid Company and advertised for the sale of the aforesaid assets in which it was mentioned that there was installed an induction furnace of the capacity of 3240 M.T. Accordingly, certain quotations were sent to defendant and plaintiff also sent their quotations. Thereafter, certain parties, including the plaintiff, were called for negotiations. The final negotiations were held on 23.5.1995, when the plaintiff-Company offered to purchase the unit for 46.00 lacs and defendant informed the plaintiff-Company that its bid for Rs.46.00 lacs for the purchase of the aforesaid industrial concern on 'as is where is basis' in terms of the negotiations held on 23.5.1995 has been accepted and demanded a further sum of Rs.3.10 lacs. Plaintiff had earlier deposited a sum of Rs.1.50 lacs.

It was further alleged by the plaintiff that at the time of negotiations, there was no question of 'as is where is basis' and thus it was contended that offer was subject to the approval of the plaintiff. The plaintiff had not conceded to this term 'as is where is basis', but had bid for the assets of the concern including its plant and machinery. It was alleged that the plaintiff had made the offer including for the induction furnace and defendant had prepared the inventory at the time of taking over of the assets by M/s Himachal Concast Pvt. Limited, which inventory included induction furnace as was mentioned having been taken over. The plaintiff was shown the inventory which was also

mentioned in the advertisement and it was implied that there existed an induction furnace, which may be inoperative due to minor fault. It was alleged by the plaintiff that after the quotation had been accepted, he wanted to inspect the premises of the Company and an official of the defendant accompanied the representative of the plaintiff to show the plant and machinery on the spot when the inspection was made on 8.6.1995, it was found that the room containing the induction furnace was locked and the key was stated to be with the Proprietor of the concern. The lock was broke open and it was found that there was no induction furnace in the room, but only a few loose wires and few components were found. It was alleged that the value of the induction furnace was about Rs.25.00 lacs. The plaintiff thereafter rescinded his contract and demanded his money of Rs.4.60 lacs deposited by him alongwith interest. The plaintiff had rescinded the contract on the ground that there existed no induction furnace which was also sold. The second ground taken by him was that there was a defect in the title since this Court had passed an order in the company petition for winding up of the Company and had appointed an Official Liquidator to take over the possession of the aforesaid Company which case was decided by a Single Judge of this Court on 22.9.1994. The notice was also put on the premises of the Company about the taking over of the assets, followed by a letter of the Official Liquidator to Managing Director of the defendant vide letter dated 30.12.1994 about the taking over of the Company by the Official Liquidator. It was alleged that the company petition had been filed much before the assets of the Company were taken over by the defendant i.e. much before 2.3.1992. It was alleged that the defendant-Corporation was bound to state the aforesaid facts to the persons who had offered to purchase the unit and the

Apex Court had ordered in SLP No.15198/93 that the defendant was ordered to sell the unit by public auction and not by asking tenders and quotations and negotiations and no application was filed to get the orders of the Supreme Court modified and the sale by negotiation was illegal and in violation of the orders of the Supreme Court. The defendant had concealed these material facts and in case the facts had been known to the plaintiff, they would not have offered to buy the unit and plaintiff thus accordingly claimed the return of the amount of Rs.4.60 lacs deposited by him.

The second part of the allegations made by the plaintiff were in regard to sale of unit known as M/s Pappi Oil Mills Pvt. Limited which had been taken over by the defendant-Corporation. The plaintiff made an offer on 2.2.1995 for the purchase of the aforesaid unit for Rs.4.51 lacs and deposited a sum of Rs.1.00 lacs as earnest money. He was called by the defendant for negotiations for 22.2.1995 and the quotation of the plaintiff was at No.2 and quotation of other person was accepted and, therefore, the offer of the plaintiff was deemed to have been rejected. The plaintiff informed the defendant, vide letter dated 18.3.1995, that the offer was valid upto 31.3.1995 and thereafter it would be subject to confirmation of the plaintiff. It was also stated therein that in case the defendants have decided the sale of the aforesaid assets of the Company to any other party, then earnest money may be refunded to the plaintiff and offer of Rs.17.71 lacs made by the plaintiff was valid only upto 31.3.1995. The plaintiff, therefore, claimed the return of the earnest money since his offer had not been accepted. The defendants allegedly sent a telegram to the plaintiff on 24.3.1995 demanding the deposit of the remaining amount by 31.3.1995, by accepting the offer of the plaintiff. The plaintiff pleaded that since his offer was not accepted

and the highest bid of another person was accepted and he did not receive the telegram asking him to deposit the balance amount, he was entitled to the refund of Rs.1.00 lac deposited by him alongwith interest.

Defendant admitted that the industrial units of M/s Himachal Concast Pvt. Limited and M/s Pappy Oil Mills Pvt. Limited were taken over by it under Section 29 of the State Financial Corporation Act, 1951 and these were offered for sale through public advertisements. In regard to the claim pertaining to Himachal Concast Pvt. Limited, the defendant admitted that plaintiff had offered to purchase the unit for Rs.46.00 lacs which offer was accepted and they also admitted having received the earnest money of Rs.4.60 lacs from the plaintiff. The sale of the unit was on 'as is where is basis' and since the plaintiff failed to pay the balance amount, the earnest money of Rs.4.60 lacs was forfeited by the defendants in accordance with the terms and conditions governing the sale. It was pleaded that the induction furnace was existing at the spot and the offer was made by the plaintiff at the very initial stage after having carried out the inspection at the spot. The defendant admitted about the winding up proceedings qua M/s Himachal Concast Pvt. Limited, but pleaded that it was not party to those proceedings and it came to know about the winding up order only on 2.1.1995. It was also pleaded that the unit of M/s Himachal Concast Pvt. Ltd. Was taken over by defendant under Section 29 of the State Financial Corporation Act, 1951 much before the passing of the winding up order in company petition and entire assets of the said Company stated to have vested in defendant from the date of taking over. Therefore, the defendant had title to the same and was competent to dealt with the same in any manner. It was also pleaded that the assets of M/s Himachal Concast Pvt. Ltd. were never taken over by the

Official Liquidator pursuant to the winding up order nor it stood vested in the Company Court.

In regard to the pleadings pertaining to the unit of M/s Pappy Oil Mill Pvt. Limited, defendant pleaded that three bidders including the plaintiff were called on 22.9.1995. The bid of highest bidder of Rs.18.00 lacs made by Hemant Kumar was accepted who backed out subsequently, therefore, the offer of the plaintiff was accepted. Such acceptance was sent to the plaintiff on 24.3.1995 by telegram followed by a letter dated 1.4.1995 and the plaintiff was asked to deposit the remaining amount and execute the requisite documents. It was further pleaded that since the plaintiff failed to deposit the amount and execute the requisite documents within the stipulated period, the amount of earnest money of Rs.1.00 lacs deposited by the plaintiff stood forfeited as per the terms and conditions.

On the pleadings of the parties, the following issues were framed by the learned Single Judge:

1. Whether the plaintiff is estopped from filing the present suit on account of its acts, deeds, conduct and acquiescence? OPD

2. Whether the plaintiff has not come with clean hands and has concealed the material facts, if so, its effect? OPD

3. Whether at the time of negotiations between the parties no question arose of on 'as is where is basis' and thus whether it was a conditional offer subject to the approval by the plaintiff, as pleaded in para 5 of the plaint? OPP

4. Whether the major components/parts of the induction furnace as prepared by the defendant in the inventory was still in existence as pleaded, if so, its effect? Onus on the parties.

5. Whether the defendant (sic) was competent to sell the unit of M/s Himachal Concast Pvt. Ltd.? OPP

6. Whether the aforesaid acceptance, if any, has been initiated because of active misrepresentation, concealment of defect in title on behalf defendant No.1, if so, its effect? Onus on the parties.

7. Whether the properties of M/s Himachal Concast have vested in the Official Liquidator prior to the negotiations with the plaintiff? OPP

8. Whether the offer of highest bidder of Qua M/s Pappi Oil Mill was accepted, if so, its effect? OPP

9. Whether the offer of plaintiff Qua M/s Pappi Oil Mills was only valid upto 31st of March, 1995, if so, its effect? OPP

10. Whether the plaintiff is entitled to any amount or refund, if so, how much? OPP

11. Whether the plaintiff is entitled to any interest? OPP

12. Relief.

Parties led their evidence and the learned Single Judge vide its impugned judgment decided Issue No.3, 4, 5 to 7 as against the plaintiff and in favour of the defendant, while Issue No.8, 9 and 10 partly were decided in favour of the plaintiff alongwith issue No.11 and consequently, the claim for the refund of Rs.1.00 lac in regard to second transaction alongwith interest at the rate of 12% from the date of deposit till the date of suit was allowed by the court alongwith interest at the rate of 6% future interest from the date of suit till realization.

Being aggrieved by the findings recorded by the learned Single Judge declining the relief for the refund of the earnest money amounting to Rs.4.60 lacs alongwith interest in regard to first transaction of M/s Himachal Concast Pvt. Ltd. and not granting interest at the commercial rate claimed by the plaintiff at the rate of 24% for second transaction, the plaintiff has preferred the present appeal. No cross appeal was filed by the respondent and, therefore, in so far as the amount of Rs.1.00 lacs alongwith interest awarded for the second

transaction is concerned, those findings have not been challenged though the plea of the plaintiff for grant of commercial interest in regard to the second transaction is to be considered in the present appeal.

We have heard the learned counsel for the parties at length and have gone through the record of the case. Our findings are as under:

Coming to the first plea taken by the plaintiff for non-deposit of the balance sale consideration, he has taken a plea that since the induction furnace was not found present in the premises which was there in the inventory prepared by the defendant, therefore, the balance amount was not deposited by the plaintiff. The plaintiff has also taken the plea that it was never agreed that the sale of the industrial unit of M/s Himachal Concast Pvt. Limited would be on 'as is where is basis' and that the offer made was subject to approval by the plaintiff. The learned Single Judge has referred to the statement of Rakesh Kumar Jain, Director of the Plaintiff-Company, who, while appearing as PW-8, has categorically admitted that as per the terms contained in the notice inviting offers, the unit was to be sold on 'as is where is basis'. He has also admitted that such notice inviting offers was read by him before submitting his offer. Therefore, the findings of the learned Single Judge recorded under Issue No.3 that the sale was to be on 'as is where is basis' are liable to be affirmed which are affirmed accordingly for reasons given below.

Coming to the first part of this question as to whether the induction furnace was still in existence as per the inventory prepared by the defendant, the claim of the plaintiff is that the firm was advertised for sale which included one induction furnace, but no such furnace was existing at the spot and only some loose wires and components of the furnace were found at the spot by PW-8

Rakesh Kumar Jain, Director of the plaintiff-Company during inspection on 8.6.1995. A perusal of the record shows that during the pendency of the suit, on the application of the plaintiff, a team of two Local Commissioners was appointed by the court to visit the factory site on 23.7.1995 and to report whether any induction furnace existed there and to report in detail about it. The report Ext.PW-2/A dated 28.7.1995 was submitted that induction furnace was found existing at the spot though most of the equipments were in rusted or bad condition. We have gone through the reasoning given by the learned Single Judge in disbelieving the case of the plaintiff in this regard and the reasons for agreeing with the said findings may be summarized as under:

No objections to such report of Local Commissioners were preferred by the plaintiff who rather relied upon the said report in evidence and also examined one of the two Local Commissioners as PW-2 Shri Chetan Sharma.,

PW-8 Rakesh Kumar Jain, Director of the plaintiff-Company, has deposed as PW-8 that before making the first offer, he had inspected the unit in December, 1994 after having read notice inviting offers. The learned Single Judge has referred to his statement wherein he has clearly stated that he had not prepared any inventory in respect of plant and machinery available at the spot when inspection of unit was done by him before making the offer of 16.51 lacs. The reasoning given by the witness was that he could not see the condition of the furnace since the premises were locked. It was for the plaintiff to have insisted upon seeing the premises before finalizing the offer and once he finalized the offer with the defendant, applying the terminology 'as is where is basis', the plaintiff is precluded from challenging the question that the induction furnace was not there or was not in good condition.

A plea was also taken by PW-8 that he was told that an FIR has been lodged in regard to theft committed in factory premises during which the machinery, articles and goods, as per inventory, were not found in the factory premises, which were allegedly stolen. However, no such copy of the FIR was obtained by him and, therefore, the deposition of DW-1 that no theft took place was relied upon by the learned Single Judge to hold the fact that no theft took place will be deemed to have been accepted by the plaintiff.

From the above discussion, it follows that the plaintiff had failed to prove that he inspected the premises before making the offer or finalizing the terms and conditions with defendant or that the induction furnace was missing from the premises after it has been inspected by him to be lying there. It is for the plaintiff to have prepared an inventory of the articles lying in the factory which was not prepared by him and he believed the inventory prepared by the defendant earlier and subsequently, some parts were not found present there. The plaintiff cannot take this plea that the induction furnace was missing and he was not bound to finalize the deal. It was for him to satisfy himself before finalizing the deal and take in possession the articles and get prepared an inventory which was not done by him. Therefore, the findings recorded by the learned Single Judge under Issue No.4 are liable to be affirmed.

The next and main question which arises for consideration is that the plaintiff has pleaded that the defendant did not possess a valid title in respect of the unit of Himachal Concast in view of the winding up proceedings having been initiated. The dates of various incidents are relevant which may be reproduced below.

The winding up order of Himachal Concast Private Limited was passed on 22.9.1994. The notice for sale was issued as per Ext.PW-8/D in November, 1994. The Company submitted its offer alongwith earnest money and they were called for negotiation on 23.5.1995. The premises were inspected by PW-8 Rakesh Kumar Jain alongwith PW-5 Shri B.M. Mehta, Assistant Manager, HPFC, on 8.6.1995. PW-8 has further stated that when he went to the spot and the Local Commissioner visited the spot on 23.7.1995, a notice of the Official Liquidator was found affixed on the outer gate of the factory premises as well as on the outer door of the office of Himachal Concast Private Limited. The copy of the notice has been proved as Ext.PW-4/A. Thus, it is clear that on that date, i.e. on 23.7.1995, the plaintiff had learnt about the winding up proceedings and the notice having been affixed at the instance of the Official Liquidator.

PW-4 Shri Gulab Chand from the office of the Official Liquidator has stated that the Official Liquidator in respect of Himachal Concast Private Limited was appointed by this Court as per order dated 22.9.1994 in company petition No.1 of 1991. He stated that the unit was taken over by the Official Liquidator on 7.12.1994 and notice Ext.PW-4/A was affixed on the premises on the same day i.e. on 7.12.1994. The letter written by the Official Liquidator to HPFC Ext.PW-4/B has also been proved in evidence. He admitted that the unit was never physically taken over by the Official Liquidator nor any inventory was prepared and the possession of the unit was with HPFC which was taken on 2.3.1992. The deal was finalized on 25.5.1995 and as per the facts of the case, the defendant though was not a party to the winding up proceedings but they had learnt about the appointment of the Official Liquidator and taking up of the Company by the Official Liquidator prior to that date. Defendant-Corporation

had applied for being impleaded as party. DW-1 Shri D.B. Arya from defendant-Corporation has stated that letter Ext.PW-4/B was received from Official Liquidator in the office of defendant-Corporation only on 3.1.1995. The physical possession may or may not have been taken by the Official Liquidator appointed by the court in the winding up proceedings but the question arises as to when the fact had become known to the defendant i.e. HPFC that winding up proceedings have been initiated and Official Liquidator has been appointed, whether the title can be said to be defective of defendant and as to whether they were competent to transfer the property in favour of the plaintiff once winding up proceedings had been initiated.

A reference can be made to the decision in **Indian Textiles and another v. Gujarat State Financial Corporation and others (1998) 2 Comp LJ 155 (Bom),** in which it was held that the Company Court deemed to be in custody of all assets of company from date of passing of winding up order and appointment of Official Liquidator. State Financial Corporation as secured creditor may thereafter invoke its powers under State Financial Corporation Act only with prior leave of Company Court, subject to *PARI PASSU* charge of workmen. It was held that State Financial Corporation was not entitled to dispose of such assets by itself without obtaining prior leave of Company Court. Corporation also not entitled to take action under Section 29 of State Financial Corporation Act or adopt proceedings before District Court for sale of securities under Section 31 thereof, without obtaining prior leave of winding up court. It was held that State Financial Corporation was not entitled to dispose of such assets by itself without obtaining prior leave of Company Court.

The law in regard to the powers of the State Financial Corporation under Section 29 and other provisions to sell the property once winding up operations have been initiated was discussed in detail by the Apex Court in **International Coach Builders Ltd. v. Karnataka State Financial Corporation, (2003) 10 Supreme Court Cases 482**. After referring to the various provisions of the State Financial Corporation Act as well as Companies Act, it was finally laid down by the Apex Court in para 32 as under:

> *"We, therefore, hold as under:*
>
> *1. The right unilaterally exercisable under Section 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up.*
>
> *2. SFCs cannot unilaterally act to realize the mortgaged properties without the consent of the Official Liquidator representing workmen for the pari passu charge in their favour under the proviso to Section 529 of the Companies Act, 1956.*
>
> *3. If the Official Liquidator does not consent, SFCs have to move the Company Court for appropriate directions to the Official Liquidator who is the pari passu charge-holder on behalf of the workmen. In any event, the Official Liquidator cannot act without seeking directions from the Company Court and under its supervision."*

This matter again came up for consideration before the Apex Court in **Rajasthan State Financial Corporation and another v. Official Liquidator and another, (2005) 8 Supreme Court Cases 190**. The Apex Court, after considering the entire law on the subject, held as follows:

> *"18. In the light of the discussion as above, we think it proper to sum up the legal position thus:*
> *(i) xxxxxxxxxx xxxxxxxxxxxxx xxxxxxxxxxxx xxxxxxx*
> *(ii) xxxxxxxxxx xxxxxxxxxxxxx xxxxxxxxxxxx xxxxxxx*
> *(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms*

of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.
(iv) xxxxxxxxxx xxxxxxxxxxxxx xxxxxxxxxxxx xxxxxxx"

The law is, therefore, clear that once winding up proceedings have been initiated and an Official Liquidator has been appointed, there could be no sale by the State Financial Corporation until and unless the consent of the Official Liquidator appointed by the court is taken and no title can be passed by the State Financial Corporation even though the possession has been taken by them of the assets of the Company. The learned Single Judge while dealing with this question has also referred to the fact that a writ petition was filed by M/s Himachal Concast which was dismissed by this Court on 13.4.1993. The SLP preferred by the Company before the Supreme Court was also dismissed on 21.10.1994. The copy of the order is Ext.PW-6/A. A perusal of this order shows that it was observed by the Apex Court that the State Financial Corporation has received an offer for sale of the unit at Rs.17.00 lacs and that the petitioner stands intimated of this offer. The petitioner, that is, Himachal Concast was at liberty to provide a customer for the unit at the sale price of Rs.17.00 lacs and above within three weeks. Otherwise, the respondent-Corporation is directed to put the unit for sale by public auction and the offer of 17.00 lacs it has received would be the first bid. The order passed by the Apex Court was clear that the unit shall be sold by way of public auction and the minimum price fixed was Rs.17.00 lacs. It was nowhere laid down that the unit can be sold by negotiations as has been held in this case and it was nowhere laid down that the consent of the Official Liquidator will not be required for finalizing the sale

transaction. The learned Single Judge had been swayed by the fact that the assets of M/s Himachal Concast were never taken over by the Official Liquidator in view of the winding up order, dated 22.9.1994, which had taken over the Company on 3.3.1992 under Section 29 of the State Financial Corporation Act, 1951. It was held that therefore, the defendant would be deemed to have become the owner of the industrial unit of M/s Himachal Concast on and w.e.f. 3.3.1992, the date such industrial unit was taken over by the defendant under Section 29(1) of the Sate Financial Corporation Act, 1951. It was held by the learned Single Judge that the subsequent order of winding up passed on 22.9.1994 would have no effect on the rights of the defendant. However, in view of the decision of the Apex Court referred to above, the said sale cannot be effected unless and until the consent of the Official Liquidator/permission of the Company Court had been taken which was necessary and, therefore, no legal title could have been passed by the defendant without the consent of the Official Liquidator. Therefore, for these two reasonings firstly, that the sale was not made by public auction but by negotiations, which was contrary to the directions of the Apex Court and secondly, that the consent of the Official Liquidator/permission of the Company Court for the sale had not been taken, therefore, no better title could have been passed by the defendant in favour of the plaintiff, who was, therefore, competent not to finalize the deal and deposit the balance amount.

From the above discussion, it also follows that once the notice had been affixed on the premises of the Company on 7.12.1994, this fact was within the knowledge of the defendant that winding up proceedings have been initiated in regard to this company and it was for them to have taken steps for the consent

of the Official Liquidator/permission of the Company Court to effect the sale, but they went on and continued with finalizing the deal which was finalized on 25.5.1995. It was required of the defendant to have intimated the plaintiff about the winding up proceedings before finalizing the deal and their action in not informing the plaintiff about the winding up proceedings itself leads to the inference that there was misrepresentation of facts and since there was a defect in the title of the defendant, they could not have passed a better title and accordingly when the plaintiff learnt about it subsequently, he was not bound to deposit the balance money and finalize the deal. The findings of the learned Single Judge that the defendant would be deemed to have become the owner of the industrial unit w.e.f. 3.3.1992 cannot be said to be correct in view of the winding up proceedings having been initiated and the deal having not been finalized, therefore, the plaintiff was entitled to the refund of the amount, that is, a sum of Rs.4.60 lacs deposited by him. The plaintiff shall be entitled to the refund of this amount alongwith interest at the rate of 12% from the date of the deposit to the date of the suit as granted by the learned Single Judge for the other transaction.

In regard to the claim preferred by the appellant for treating it as a commercial transaction, we are of the opinion that the learned Single Judge has rightly granted interest at the rate of 12% from the date of deposit till the date of suit and has also granted interest at the rate of 6% from the date of suit till realization of the amount and plaintiff shall be entitled to future interest at the rate of 6% accordingly for this period also for this first transaction of Rs.4.60 lacs. The plea to grant commercial interest is rejected.

In view of the above discussion, the appeal filed by the appellant is accepted partly. Decree sheet be prepared accordingly. The appeal is allowed alongwith costs.

(Deepak Gupta), J.

7th August, 2007. (trs) **(V.K. Ahuja), J.**